A

JUPITERS LTD

v.

LIM KIN TONG

B

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: D5-22-288-2002]
12 DECEMBER 2005

C ***BETTING, GAME AND LOTTERY:*** *Gaming - Gaming debts - Plaintiff's claim for sum of AUD$795,601,61 - Cheques for gaming debts dishonoured - Whether licenced casino can commence legal proceedings in courts of Malaysia to recover sums - Whether an enforceable gaming debt under laws of Queensland, Australia can form subject matter of recovery*
D *proceedings within jurisdiction of this court - Whether action for gaming debt can be brought and maintained in Malaysia - Civil Law Act 1956, ss, 26(2), 26(4) - Common Gaming Houses 1953, s. 27A*

CONTRACT: *Gaming or wagering contract - Gaming - Gaming debts - Plaintiff's claim for sum of AUD$795,601,61 - Cheques for gaming*
E *debts dishonoured - Whether licenced casino can commence legal proceedings in courts of Malaysia to recover sums - Whether an enforceable gaming debt under laws of Queensland, Australia can form subject matter of recovery proceedings within jurisdiction of this court -*
F *Whether action for gaming debt can be brought and maintained in Malaysia - Civil Law Act 1956, ss. 26(2), 26(4) - Common Gaming Houses 1953, s. 27A*

This was the plaintiff's claim against the defendant for a sum of
G AUD$795,601,61 (RM2,104,817) due and owing to the plaintiff as gaming debts to the plaintiff's licensed casino operating in Queensland, Australia. The plaintiff runs a casino conducting lawful gaming activities in accordance with the laws of the State of Queensland, Australia – *ie*, the Queensland Casino Control Act 1982. The defendant was an individual who frequented the casino
H between 10 January 1998 to 25 February 1998. For the purpose of gaming at the casino, the defendant opened a Cheque Cashing Facility (CCF) with the casino. The defendant had issued two cheques in favour of the casino for the sums of AUD$500,000 and AUD$300,000 (equivalent to RM1,316,950 and RM799,590
I respectively and totaled RM2,116,540). The defendant incurred losses in the conduct of lawfully authorised and prescribed betting

and gaming activities at the casino and lost these sums. When the Casino presented the cheques for payment, the said cheques were dishonoured by reason that they were 'countermanded by drawer' *ie*, the cheques were countermanded by the defendant. On 23 June 1999 and 7 December 2000 the defendant made part payment amounting to AUS164,398.39 of the debt outstanding from the defendant to the plaintiff, leaving a balance sum of AUD$795,601.61(RM2,104,817) due and owing to the plaintiff. The issues to be determined were (i) where a person has issued a cheque for his gaming debts to a licensed casino (and the giving and receiving of which is permitted under the applicable law to the casino) and the said cheque was dishonoured, can the licensed casino commence and continue legal proceedings in the Courts of Malaysia to recover sums made payable under the dishonoured cheque; and (ii) whether the balance of the gaming debt of AUD$795,601.61 (equivalent to RM2,104,817.00) being an enforceable gaming debt under the laws of Queensland, Australia, could form the subject matter of recovery proceedings against the defendant within the jurisdiction of this honourable court and consequently for judgment to be entered for such gaming debt. The plaintiff submitted that this court (in Malaysia) could apply the laws of Queensland and make an order on the two issues to be determined in favour of the plaintiff because the gaming contract was not illegal in Malaysia. The defendant, on the other hand, argued that any action on the cheques given in a foreign country for gaming and to be recovered as gaming debt in Malaysia ought to be dismissed notwithstanding gaming was legal in that foreign country (Australia) by virtue of s. 26(2) of the Malaysian Civil Law Act 1956 and s. 31(1) of the Contracts Act 1950. The defendant also argued that the cheques were issued to pay for gaming debts, and the consideration was illegal; and therefore not recoverable.

Held (dismissing plaintiff's claim):

(1) From reading the Malaysian provisions of ss. 26(2) and 26(4) of the Civil Law Act 1956 as well as the English Gaming Acts (1845 and 1892), the Malaysian law is in *pari materia* with the laws in England. This court followed the decision in *Moulis v. Owen* where the action therein was dismissed. The plaintiff herein was prohibited from bringing or maintaining any action or suit to claim a gaming debt in the court of Malaysia by virtue of those provisions. There was no exception to this statutory prohibition. (para 13)

(2) The expression 'No action shall be brought or maintained' in s. 26(2) of the Civil Law Act 1956 should be characterized *in laminae* with the court in *Leroux v. Brown* 12 CB 799 as 'parcel of the procedure'. If so characterised, it followed, that *lex fori* applied to s. 26(2) of the Civil Law Act 1956 quite independent of what the laws of Queensland, Australia enacts or says. The laws of Queensland, Australia was irrelevant to any claims for gaming debts in Malaysia. No action for gaming debt could be brought or maintained in Malaysia. That being so there was no reasonable cause of action on which this court could grant any form of relief. The action must be shot down at the outset. To persist and 'maintain' the action was an abuse of the process of the courts. Being part of *lex fori*, the second procedural part of s. 26(2) of the Civil Law Act 1956 relieved the court of adjudicating on foreign wagering contracts which by the ordinary rules of private international law would escape invalidation by the first part (s. 26(1) of the Civil Law Act 1956). (paras 36 & 37)

(3) In Malaysia, generally gaming or betting is illegal unless the operator holds a valid licence issued by the Minister of Finance to carry out such activities under s. 27A of the Common Gaming Houses Act 1953. In the present case the gaming activities were carried out in Queensland and there was no question of a valid licence issued by the Minister of Finance under s. 27A of the Common Gaming Houses 1953. Therefore such gaming activities must be considered as illegal in the context of Malaysian law. (para 41)

Obiter:

(1) The local courts should not, as a matter of principle and public policy, act as gambling debt collectors for foreign casinos. The courts must stand guided by the principle that the courts of justice must remain out of bounds to claims based on gaming debt, particularly when there are express statutory provisions such as ss. 26(2) and 26(4) of the Civil Law Act 1956 and s. 31 of the Contracts Act 1950. Our local statutory provisions must be given full effect by our courts in Malaysia. (para 52)

Case(s) referred to:

Attorney-General of Hong Kong v. Zauyah Wan Chik & Ors & Another Appeal [1995] 3 CLJ 35 CA ***(refd)***

Chan Kwon Fong & Anor v. Chan Wah [1977] 1 MLJ 232 ***(refd)***

Hill v. William Hill (Park Lane) Ltd [1949] AC 530 ***(refd)***

Hope v. Hope [1857] 8 De GM & G 731; 44 ER 572 ***(refd)***

Las Vegas Hilton Corporation Las Vegas Hilton v. Kho Teng Hock Sunny [1997] 1 SLR 341 ***(refd)***

Leroux v. Brown 12 CB 799

Moulis v. Owen [1907] 1 KB 746 ***(refd)***

Ong Guan Hua v. Chong [1963] 29 MLJ 6 ***(refd)***

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***

Star City Pty Ltd (fka Sydney Harbour Casino Pty Ltd) v. Tan Hong Woon [2002] 2 SLR 22 ***(refd)***

The Ritz Hotel Casino Ltd and Anor v. Dato' Seri Osu Hj Sukam [2005] 3 CLJ 390 HC ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, s. 30

Civil Law Act 1956, ss. 26(1), (2), (3), (4)

Common Gaming Houses Act 1953, s. 27A

Contracts Act 1950, s. 31(1)

Rules of the High Court 1980, O. 14A

Civil Law Act [Sing], ss. 5(2), 6

English Gaming Act of 1845, s. 18

Gaming Act 1892, s. 1

Other source(s) referred to:

Dicey and Morris on Conflict of Laws, 12th edn, p 81

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

[1] The plaintiff's claim against the defendant is for a sum of AUD$795,601.61 (RM2,104,817) due and owing to the plaintiff as gaming debts to the plaintiff's licenced casino operating in Queensland, Australia.

A **Brief Facts**

[2] The plaintiff runs a casino by the name of "Conrad International Treasury Casino" in the city of Brisbane, in the State of Queensland, Australia. The casino conducts lawful gaming
B activities in accordance with the laws of the State of Queensland, Australia – ie, the Queensland Casino Control Act 1982. The defendant is an individual who frequented the Casino, and on the facts of this case, between 10 January 1998 to 25 February 1998. For the purpose of gaming at the Casino, the defendant opened a
C Cheque Cashing Facility (CCF) No: 932619 on our about 9 November 1997 with the casino. The defendant issued (2) cheques in favour of the casino. The (2) cheques were for the sums of AUD$500,000 and AUD$300,000 (equivalent to RM1,316,950 and RM799,590 respectively and totaled
D RM2,116,540).

[3] The defendant incurred losses in the conduct of lawfully authorised and prescribed betting and gaming activities at the casino. The defendant lost these sums. When the casino later,
E presented the cheques for payment, the cheques were dishonoured by reason that they were 'countermanded by drawer' ie, the cheques were countermanded by the defendant.

[4] On 23 June 1999 and 7 December 2000 the defendant made part payment amounting to AUS164,398.39 of the debt
F outstanding from the defendant to the plaintiff, leaving a balance sum of AUD$795,601.61 (RM2,104,817) due and owing to the plaintiff. The statement of claim makes claim for this sum of AUD$795,601.61.

G **[5]** On agreement of both parties, the court ordered the following (2) issues to be heard by way of a trial on point of law under O. 14A, Rules of the High Court 1980 procedure. The 2 issues to be determined are as follows:

H (i) Where a person has issued a cheque for his gaming debts to a licensed casino (and the giving and receiving of which is permitted under the applicable law to the casino) and the said cheque is dishonoured, can the licensed casino commence and continue legal proceedings in the Courts of Malaysia to
I recover sums made payable under the dishonoured cheque?; and

(ii) whether the balance of the gaming debt of AUD$795,601.61 (equivalent to RM2,104,817) being an enforceable gaming debt under the laws of Queensland, Australia, could form the subject matter of recovery proceedings against the defendant within the jurisdiction of this Honourable Court and consequently for judgment to be entered for such gaming debt?

[6] It is also agreed by both parties that the plaintiff's claim as reflected in the statement of claim is enforceable and recoverable under the applicable laws of Queensland, Australia. It is on this basis that expert evidence need not be adduced as to what is the law of Queensland on the issue in question.

Plaintiff's Arguments

[7] The transaction took place in a licenced casino in Queensland, Australia. The transaction was carried out in compliance with the laws of Queensland; and the claim would be recoverable if brought in Queensland. Therefore, the plaintiff submits that this court (in Malaysia) can apply the laws of Queensland and make an order on the 2 issues to be determined in favour of the plaintiff because the gaming contract is not illegal in Malaysia. The plaintiff cited the decision or the Singapore High Court in *Las Vegas Hilton Corporation d/a Las Vegas Hilton v. Khoo Teng Hock Sunny* [1997] 1 SLR 341. In that case, the defendant, a Malaysian, obtained a loan/credit facility from a casino in Las Vegas for a sum of US$1,000,000. The loan documentation (like the Cheque Cashing Facility (CCF) in the present case) were prepared, signed, carried out and concluded in the State of Nevada, USA. After several visits to the casino the defendant lost at the gambling table. He owed the casino US$1,158,037. The action was filed in Singapore for repayment of the loan. The High Court in Singapore held that the proper law of the loan documentation was the laws of the State of Nevada. The court went on to hold that it could apply the laws of the State of Nevada in Singapore despite the provisions of section 6 of the Singapore Civil Law Act (equivalent to the Malaysian s. 26, of the Civil Law Act 1956). The plaintiff cited the relevant passage at p. 353, where the court said:

A The fact that if the present contract between the parties had been governed by Singapore laws the contract could be invalid or void (under section 6 of the Civil Law Act 1956) does not mean that it, being governed by Nevada Laws and valid under that law, may not be enforced in Singapore.

B **[8]** The plaintiff further submits that the claim is brought on the dishonoured cheques which were issued under the Bills of Exchange Act 1949. They are bills of exchange as defined under the said Act. By virtue of s. 30 of the Bills of Exchange Act 1949 which presumes that cheques were given for value and in good C faith, the plaintiff argues that, the court does not need to go behind the cheques to examine the underlying transaction. Therefore, the plaintiff submit that the issue that the cheques were related to gaming activities at the casino is not relevant for consideration in this claim.

D

Defendant's Arguments

[9] The defendant, on the other hand, argues that any action on the cheques given in a foreign country (to wit Australia) for E gaming and to be recover as gaming debt in Malaysia ought to be dismissed notwithstanding gaming is legal in that foreign country (Australia), by virtue of s. 26(2) of the Malaysian Civil Law Act 1956 and s. 31(1) of the Contracts Act 1950. The defendant also argues that the cheques were issued to pay for gaming debts, and F the consideration is illegal; and therefore not recoverable.

Findings Of The Court

[10] The cheques were given on 10 February 1998 and 14 February 1998 respectively. They were for the sums of G AUD$500,000 and AUD$300,000 (equivalent to RM1,316,950 and RM799,590). They were for payment of gaming chips taken from the plaintiff's casino between the period 10 January 1998 to 25 February 1998. The chips were used for gaming at the casino. The gaming chips were lost to the plaintiff and hence the gaming H debt to the plaintiff. The cheques were to be drawn on Southern Bank Berhad, Malaysia. Upon presentation at the Southern Bank Berhad, the cheques were both dishonoured. The defendant paid a sum of RM11,1723 towards the gaming debt to the plaintiff. He did not pay the balance of the gaming debt now being claimed by I the plaintiff. The central issue before the court is: Can the cheques be used as a cause of action for a claim against the defendant in Malaysia?

[11] The cheques were issued pursuant to the terms of a Cheque Cashing Facility (CCF) operated at the plaintiff's casino. It is not disputed the purpose of this facility was to enable the defendant to cash cheques issued by him to the plaintiff in relation to gaming activities at the plaintiff's casino. In order to understand better the problem at hands, it may be appropriate to explain the detail mechanism of the CCF as operated by the plaintiff's casino.

The Cheque Cashing Facility (CCF)

[12] If one looks at the CCF, one will notice that it is entitled "Cheque Cashing Limitation Application". On an examination of all the documents and the terms and conditions therein, it will show that it is purely to ascertain the liquidity of the customer by the casino. Without the CCF, a patron or customer will not be able to gamble at the casino unless he has enough cash in hand to pay for the gaming chips or has sufficient funds in his cash deposit accounts.

[13] In the celebrated Singapore Court of Appeal's case of *Star City Pty. Ltd. (fka Sydney Harbour Casino Pty. Ltd.) v. Tan Hong Woon* [2002] 2 SLR 22 (at p. 25), Justice Yong Rung How (CJ) considered the CCF and explained the mechanism as follows:

> There are basically three ways by which a patron can obtain chips for gaming in the Casino. The first is by simply exchanging cash for chips at either the counters or the gambling tables; the second will be through a deposit account and the third is through the Cheque Cashing Facility ("CCF"). A patron who has been granted a credit facility hands over a cheque to the Casino in exchange for a Chip Purchase Voucher ("CPV") of an equivalent value. The CPV will then be exchanged for chips for gaming at the tables. If the patron does not have his personal cheques with him, he may request to make use of counter cheques, known as 'house cheques'. A house cheques is simply a document printed on a format which has been pre-approved by the Casino Control Authority and is recognized by most banks in Australia. The patron after signing the house cheque hands it over to the counter staff in exchange for a CPV and consequently chips for gaming.

[14] At pp. 38-39 (para 36) the judge went on to explain as follows:

> The chips placed on the gaming tables represent the moneys paid in advance by the gamblers to the Casino by the cheques, although the actual transfer of funds will come later. Therefore, the chips lost at the tables represented the gambling losses of the patron. Although cheques are to remain uncashed and can be redeemed upon "repayment" by gamblers within a period of ten days, this is only a deferred form of payment to give gamblers time to ensure that they have sufficient funds to repay their gambling losses in their bank accounts. The cheque cashing facility provided by Star City to their patrons cannot be genuine loans because the facility merely enables them to gamble on credit and is not for any other purpose.

[15] Several features of the CCF that had been offered by the plaintiff's casino to the defendant are:

(i) the chips are worthless outside the casino and are mere counters;

(ii) no moneys were ever actually advanced by the casino. The casino only give the gambler the right to gamble at the tables upon presentation of the house cheques;

(iii) any moneys that were lost were made good by the gambler and not the casino.

[16] The nature of the transaction clearly shows that the cheques were being used to pay for the gaming chips and any money to be recovered by the casino is moneys won/lost upon a wager. The exchange of a cheque for the chips is an essential part of the composite gambling contract. It is a means by which gambling is to take place. That being the case, the court is of the view that the 2 cheques issued by the defendant in the present case were clearly for the purpose of gaming at the plaintiff's casino.

Applicable Laws

[17] The following Malaysian statutory provisions are relevant for the purpose of the present consideration:

Section 26(2) of the Civil Law Act 1956 which provides that:

> No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wagers has been made.

[18] Section 26(4) of the Civil Law Act 1956, which provides that:

> Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

[19] Section 31(1) of the Contracts Act 1950, which provides that:

> Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on a wager, or entrusted to any person to abide the results of any game or other uncertain event on which any wager is made.

[20] There is not much literature in Malaysian case law to assist the court to appreciate the import of s. 26(2) and (26(4) of the Civil Law Act 1956. There are however, English case law that has expounded statutory provisions which are in *pari materia* with these sections and from which these sections were taken. The case of *Ong Guan Hua v. Chong* [1963] 29 MLJ 6 (at p. 7), is illustrative of this point when Justice Thomson CJ said:

> In the second place it is to be observed that the law in this country relating to contracts or agreements by way of gaming or wagering are not the same as in England. Sections 26(1), (2) and (3) of the Civil Law Act 1956 and s. 30(1) of the Contracts Act (Malay States) Ordinance 1950 reproduce s. 18 of the English Gaming Act of 1845, and section 26(4) of the Civil Law Act is the same as section 1 of the English Gaming Act 1892. Those are the provisions of the law in England which make certain contracts relating to gaming and wagering unenforceable. There is however, nothing in our law which corresponds with the English Gaming Act of 1710 and 1835, one result of which is that securities giving in respect of wager and games and pastimes (including horse-racing) are deemed to be given upon an illegal consideration. In this country, then, there is no distinction between wagering on games and other types of gaming and in every case the question of gaming is to be considered in the light of the local statues which correspond to the English Gaming Act of 1845 and 1892.

[21] The English 1892 Act, does no more than to extend the consequences of non-enforceability to a wide range of contracts relating to gaming that fall within the four walls of the 1845 Act, s. 18 of which provides that contracts by way of gaming and wagering shall be null and void and that no suit shall be brought or maintained to recover any sum of money alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which the wager has been made.

[22] The court can therefore look fruitfully to the English cases that have considered s. 18 of the English Gaming Act 1845 for guidance to the interpretation of our s. 26(2) of the Civil Law Act 1956. The high water mark of the exposition of s. 18 English Gaming Act 1845 is the case of *Hill v. William Hill (Park Lane) Ltd* [1949] AC 530 decided by the House of Lords.

[23] In that case, the debate in the House of Lords was whether the first part of s. 18 English Gaming Act 1845 controlled and interpreted the second part of the same section and was "in effect tautological" or in fact had a force of its own.

[24] In our s. 26 of the Civil Law Act 1956, those two parts have been separated to sub-section (1) and sub-section (2). This is precisely what the majority of the House of Lords concluded. Lord Green's analysis of the section is instructive in our understanding of the ambit of sub-section (1) and sub-section (2) of s. 26 of the Civil Law Act 1965, Lord Greene: "My Lords, s. 18 of the Gaming Act 1845, by its first branch (our s. 26(1) of the Civil Law Act 1956) makes gaming and wagering agreements null and void. Such contracts are struck with invalidity at the outset ie, before the event contemplated by the wager is completed ... The second branch (our s. 26(2) of the Civil Law Act 1956) is different. It is concerned with a state of affairs, which can only arise after the event. What it prohibits is the bringing of any suit 'for recovering any money or valuable thing alleged to be won upon any wager".

[25] Further on in his speech, Lord Greene says:

> Under the first branch the agreement is a nullity before the race is run. The second branch assumes the race to have been run and the bet to have been lost.

[26] On p. 554, Lord Greene concludes by saying: A

> On the construction of the section, therefore, I come to the conclusion that the second branch means what it says and is not confined to actions where the agreement sued upon is the wagering agreement itself.

B

[27] What all this means in the context of matters before this court is that s. 26(2) Civil Law Act 1956 "prohibits … the bringing of any suit 'for recovering any sum of money or valuable thing alleged to be won upon any wager'"

C

[28] In the case of *Moulis v. Owen* [1907] 1 KB 746, the issue before the English Court of Appeal was whether the Gaming Act of 1845 and the Gaming Act of 1892 applied to gaming carried on in a foreign country where gaming was legal. In that case, the defendant gave the plaintiff in Algiers a cheque drawn by him on D an English bank, partly in payment of money lent by the plaintiff to the defendant to enable the defendant to play at baccarat in a club at Algiers and, as to the balance, to be applied by the plaintiff in discharging debts incurred by the defendant when playing at baccarat in the club. The consideration for the cheque E was legal according to the law of France. In an action on the cheque, it was held by Collins MR and Cozens – Hardy LJ (Fletcher Moulton LJ dissenting) that inasmuch as the transaction was governed by the English law, the cheque must be deemed to have been given for an illegal consideration and that the action F was therefore, not maintainable.

[29] At p. 753, it was held that the joint effect of s. 18 of the Gaming Act 1845 and s. 1 of the Gaming Act 1892, is that such contract would be rendered null and void and no action shall be G brought or maintained to recover any such sum of money. This decision has stood the test of time.

[30] This decision is a statutory defence and therefore it is necessary to see if there is similar legislation in our jurisdiction. The H English Gaming Act 1845, s. 18 prohibits an action being "brought or maintained in any Court of Law and Equity" for "any sum of money or valuable thing alleged to be won on a wager." A similar provision is found in our Civil Law Act 1956, in which s. 26(2) also prohibit an action being "brought or maintained in I any court for recovery of any sum of money or valuable thing alleged to be won on a wager …".

[31] Section 1 of the English Gaming Act 1892 is in *pari materia* with s. 26(4) of our Civil Law Act 1956. It is clear and unambiguous that from reading the two Malaysian provisions of ss. 26(2) and 26(4) of the Civil Law Act 1956 as well as the English Gaming Acts (1845 and 1892) the Malaysian law is in *pari materia* with the laws as in England. This court is more inclined to follow the decision in *Moulis v. Owen* where in that case the action was dismissed with costs. It follows that the plaintiff in the present case is prohibited from bringing or maintaining any action or suit to claim a gaming debt in the Court of Malaysia by virtue of those provisions. This is a statutory prohibition. There is no exception to this statutory prohibition.

Effect Of A Foreign Gaming Transaction

[32] Does the fact that the gaming debt which was incurred in a licensed gaming casino in a foreign country make an exception to the above mentioned statutory prohibition if that gaming debt could be enforced by the courts in that country?

[33] The effect of the above question brings into focus issues of conflict of laws. In particular *lex fori* and *lex causae*. The most suitable approach to resolve the above question of whether *lex fori* or *lex causae* applies is to look to Dicey and Morris on *Conflict of Laws* (12th ed) for the basic principles applicable: "Rule 17: All matters of procedure are governed by domestic law of the country in which the court wherein any legal proceedings are taken belong *(lex fori)*."

[34] The commentary is as follows:

> The principle that procedure is governed by *lex fori* is of general application and universally admitted. In a body of Rules, such as those contained in this book, which states the principles enforced by an English Court, the maxim that procedure is governed by *lex fori* means in effect that it is governed by the ordinary laws of England without reference to any foreign law whatever. Thus the English Court will apply its own rules of procedure, and will, moreover, refuse to apply any foreign rule which in its view is procedural.

[35] The above principle has been endorsed by Gopal Sri Ram JCA in Attorney-General of *Hong Kong v. Zauyah Wan Chik & Ors. and Another Appeal* [1995] 3 CLJ 35 where His Lordship followed the decision of Raja Azlan Shah FJ (as he then was) in *Chan Kwon Fong & Anor v. Chan Wah* [1977] 1 MLJ 232 who

opined "Once the cause action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive ... I may as well add the nature of the plaintiff's remedy is determined by *lex fori.*"

[36] The remedy claimed in the present action is a claim for money lost by the defendant to the plaintiff while the defendant was gaming in the plaintiff's licensed casino. It now falls how s. 26(2) of the Civil Law Act 1956 is characterized or ought to be characterized by the court in this case. The expression in s. 26(2) of the Civil Law Act 1956 namely "No action shall be brought or maintained in any court" has had itself characterized in an old case of *Leroux v. Brown* 12 CB 799 where Maule J held as follows: "The 4th section of the statute of frauds enacts that 'no action shall be brought upon any agreement ... The particular section does not in terms say that no such contract as before stated shall be of any force: it says no action shall be brought upon it ... It is parcel of the procedure and not the formality of the contract). The court is of the view that the expression "No action shall be brought or maintained" in s. 26(2) of the Civil Law Act 1956 should be characterized *in laminae* with the court in Leroux, as "parcel of the procedure". If so characterized by the court, it follows, that *lex fori* applies to s. 26(2) of the Civil Law Act 1956 quite independent of what the laws of Queensland, Australia enacts or says. The laws of Queensland, Australia is irrelevant to any claims for gaming debts in Malaysia. No action for gaming debt can be brought or maintained in Malaysia. That being so there is no reasonable cause of action on which this court can grant any form of relief. The action must be shot down at the outset. To persist and "maintain" the action is an abuse of the process of the courts.

[37] Section 18 of the English Gaming Act 1845, (in *pari materia* with s. 26 of the Civil Law Act 1956) makes wagering contracts null and void. It also forbids suits being brought to recover money won on wagers. It is, therefore, a statute which deals both with the validity and the enforceability of contract. The validity of a foreign wagering contract is not affected by this statute, but, though valid, it cannot be sued upon in an English Court. Being part of *lex fori*, the second procedural part of the section (s. 26(2) of the Civil Law Act 1956) relieves the court of adjudicating on foreign wagering contracts which by the ordinary rules of private international law would escape invalidation by the first part (s. 26(1) of the Civil Law Act 1956).

[38] In the case of *Star City Pty. Ltd. (fka Sydney Harbour Casion Pty. Ltd.) v. Tan Hong Woon (supra)*. Justice Yong Pung How (CJ) maintained that s. 5(2) of the Singapore Civil Law Act (which is in pari material with s. 26(2) of the Civil Law Act 1956 of Malaysia) is procedural *(lex fori)* in nature and it therefore renders unenforceable all actions to recover sums won upon wagers. His Lordship in disallowing the recovery of gaming debt further went on to state "However, it is contrary to local public policy for the courts to be used by casinos to enforce gaming debts disguised in the form of loan".

[39] In the Malaysian case of *Pet Far Eastern (M) Sdn. Bhd. v. Tay Young Huat & Ors* [1999] 2 CLJ 886, Abdul Malik Ishak J in *obiter* had this to say: "the gambling activities conducted by the 2nd defendant while legal in international waters, was illegal in Malaysia, unless the 2nd defendant held a valid license to carry out such activities under s. 27A of the Common Gaming Houses Act 1953. A transaction of this nature must be void as the Malaysian law does not recognize gambling contracts ...or the concept of 'no-man's land. His Lordship further went on to state that "In my judgment, false labeling of gambling debt as an account stated or as a loan cannot derogate it from being a gambling debt. A rose is still a rose no matter what you call it. The court must look at the reality of the transaction and decide once and for all without fear or favour. To me the devise of using chips on board the cruise ship or vessel MV Amusement World by the 2nd defendant was a mere sham to circumvent the CGH Act and the Betting Act. The matter arose out of a betting transaction, although the 2nd defendant called it as a contract. Under the Malaysian law such a transaction was absolutely void. I must on my own motion take the point that a betting transaction must be struck down as being void."

[40] In the present case, at one stage of the submissions, the plaintiff submits that a gaming contract is not illegal under Malaysian law and therefore, even if the action is brought here, this Court can apply the laws of Queensland and make an order on the issues in favour of the plaintiff. This court cannot agree with this submission.

[41] In Malaysia, generally gaming or betting is illegal unless the operator hold a valid licence issued by the Minister of Finance to carry out such activities under s. 27A of the Common Gaming Houses Act 1953. In the present case the gaming activities were

carried out in Queensland and there is no question of a valid licence issued by the Minister of Finance under s. 27A of the Common Gaming Houses 1953. Therefore, such gaming activities must be considered as illegal in the context of Malaysian law.

[42] That being the case, adopting the phrase of Abdul Malik Ishak J in *Pet Far Eastern (M) Sdn. Bhd.* case "a transaction of this nature must be void as the Malaysian law does not recognise gambling contract ... and must be struck down as being void".

Issue Of Public Policy

[43] In dealing with the subject matter of this nature, the question of public policy (in Malaysia) must also be considered - ie, whether our courts should help in the enforcement of gambling contracts technically outside local statutory prohibitions but with potentially deleterious effects on the social and economic fabric of our society.

[44] It is an established principle of private international law that the courts in a local jurisdiction will not enforce a foreign cause of action that is contrary to local public policy. We need only refer to *Dicey and Morris* (12th edn) at p. 81:

> Rule 2 – English Courts will not enforce or recognize a right, power, capacity, disability, or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be in consistent with the fundamental public policy of English law.

[45] This was also echoed by Turner J in *Hope v. Hope* [1857] 8 De G M & G 731; 44 ER 572:

> I think that, when the Courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it.

[46] Is the enforcement of such gaming contract (as in the present case) in Malaysia contrary to public policy in Malaysia? What is "public policy"?

[47] Pollock & Mulla on *Indian Contract And Specific Relief Act*, 10th edn, describes "public policy" in the following terms:

> Public Policy – The principle of public policy is this: *ex dolo molo non oritur* action. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare.

[48] There is no doubt that gaming or gambling is injurious to the public welfare of our local society. It is recognised that gambling or gaming should be avoided and therefore it cannot be good social behavior to indulge in it. In multi-racial and multi-religious Malaysia, Muslims are expressly prohibited from patromising casinos and other gambling outlets. Gambling is similarly prohibited by the Bible. The Malaysian of Chinese descend also face the problem of gambling whose associate of is the loan shark (Ah Longs). The Hindus as well the Buddhist also have a disdoin for gambling.

[49] This issue of public policy in relation to gaming or gambling has been elaborated at great length by Justice Ian Chin in the recent case of *The Ritz Hotel Casino Limited and Anor v. Dato' Seri Osu Haji Sukam* [2005] 3 CLJ 390.

[50] This court is in full agreement with Justice Ian Chin on this issue. The relevant passage from the said judgment is adopted and reproduced below:

> There is no doubt that gambling is injurious to the public welfare or else there would not have been a law from time immemorial that gambling debts are irrecoverable. Not only that, two of the principles of Malaysia national philosophy called the Rukun Negara (in the Malays language), that is Belief in God and Good Social Behavior, would mean that gambling is injurious to the public welfare as being against the Rukun Negara. The complete principles of the Rukun Negara that guide Malaysians are these:
>
> 1. Belief in God
> 2. Loyalty to King and Country
> 3. Supremacy of the Constitution
> 4. The Rule of Law
> 5. Mutual respect and good social behavior.

It is recognized that gambling and prostitution are two twin vices that we should avoid and therefore, it cannot be good social behavior to indulge in them. In multi-racial and multi-religious Malaysia, Muslims are expressly prohibited from patronizing casinos and other gambling outlet and the Qur'an forbids so in these words:

> They ask you concerning alcohol and gambling. Say: "In them is a great sin, and some benefits for men, but the sin is far greater than the benefit." (Holy Qur'an 2:219)

Gambling is similarly prohibited by the Bible and I need only reproduce one of many verses in the Bible that says so implicitly:

> He that hastens to be rich hath an evil eye, and considers not that poverty shall come upon him. (Prov. 28.22).

The Chinese in China had from dynasty to dynasty wrestled with the problem of gambling and banning it and the Malaysian of Chinese descend also face the problem of gambling whose associate of is the loan sharks. Another civilization that frowns upon gambling are the Hindus and I need only refer to the following couplets of the Tirukural, a 2,200-year-old South Indian Dravidian classic on ethical; living and the revered scripture in South India, where they say:

931. Do not take to gambling, even if you can win, for your wins will be like the baited hooks that fish swallow.

932. To win once, a gambler loses a hundred times. What a way to procure happiness and prosperity!

933. Incessantly calling bets on rolling dice causes a man's rich reserved and potential revenues to run elsewhere.

934. Gambling brings on many miseries and erodes one's good name. Nothing else ends in such wretched poverty.

935. Desiring to win everything, those who love the dice, the gambling hall and their lucky hand lose it all.

936. Gambling is Misfortune's other name. Fools ensnared by her will suffer an empty stomach and distressing sorrows.

937. Spending time in the gambling hall squanders ancestral wealth and wastes personal worth.

938. Gambling will consume a man's wealth and corrupt his honesty. It will curtail his benevolence and increase his torment.

939. Those who take to gambling's fickle gain forfeit these five: raiments, riches, rations, renown and erudition.

940. The gambler's passion increases with the losses incurred. Even so does the soul's craving for life grow with the griefs suffered.

The Buddhists also have a disdain for gambling and I need only quote the following passage to prove the point:

> Similarly, correct conduct was also crucial to preserving one's prosperity. In this respect, the Buddha advised Sigala to avoid six activities which would lead to the loss of prosperity that is gained through the fulfillment of one's social responsibilities and one's correct allocation of income. The six activities to be avoided are gambling, costly entertainment, associating with bad friends, laziness, consumption of intoxicants and sauntering in the streets at unseemly hours. (Buddhism In Practice, Dr. Peter Della Santina, Ph. D).

I can go on with citing from other faith or religion but I do not think it is necessary as what I have mentioned is enough justification for saying that it is universally accepted that gambling is a vice. It is also universally recognized in Malaysia that gambling is evil and against the teaching of our religion and not the least of all that gambling appeals to greed, that is getting rich without having to work. Belief in God, one of the principles of our national philosophy, must surely mean believing and following the teachings of the religion. It was mentioned that gambling is allowed under licence in Malaysia but that was because it was to prevent it from being run by the underworld and it was not that it was something that was good. It is my view that any profit to be made from gambling (and from prostitution) can fairly be said to be profit from vice.

[51] Justice Yong Rung How (CJ) in the case of *Star City Pty. Ltd. v. Tan Hong Woon (supra)* was very bold in his statement when he said:

> However, what is objectionable is Courts being used by casinos to enforce gambling debts disguised in the 'form' of loans. Valuable Court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims. The machinery of the Courts cannot be used indirectly to legitimise the recovery of moneys won upon wagers overseas when similar relief would be refused for moneys won upon wagers in Singapore. Hence in order to give full effect to s. 5(2) of the Civil Law Act, which provides that no action can be

brought or maintained to enforce gambling debts, the Courts of the forum cannot be prevented by foreign law from investigating into the true nature of the transaction.

[52] The local courts should not, as a matter of principle and public policy, act as gambling debt collectors for foreign casinos. The Courts must stand guided by the principle that the Courts of justice must remain out of bounds to claims based on gaming debt, particularly when there are express statutory provisions such as ss. 26(2) and 26(4) of the Civil Law Act 1956 and s. 31 of the Contracts Act 1950. Our local statutory provisions must be given full effect by our courts in Malaysia.

Conclusion

[53] In the premises, both the issues to be determined by the court in the present proceedings must be answered in the negative. The effect of the answer is in favour of the defendant. Therefore, the plaintiff's claim against the defendant is dismissed with no order as to costs. Adopting the same reasoning given by Justice Ian Chin in the case of *The Ritz Hotel Casino Limited & Anor v. Dato' Seri Osu Haji Sukam (supra)*, "the defendant is not deserving of costs as he had engaged in activity that his religion frowns upon and which it would be against public policy to assist him by way of awarding him costs."